IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1987

NO. 87-1671

RICHARD L. DUGGER,
Secretary, Florida Department
of Corrections and
ROBERT A. BUTTERWORTH, Attorney General,
State of Florida,

Petitioners,

vs.

RONALD JACKSON,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF OF RESPONDENT IN OPPOSITION

BENNETT H. BRUMMER
Public Defender
Eleventh Judicial Circuit
of Florida
1351 Northwest 12th Street
Miami, Florida 33125
(305) 545-3005

KAREN M. GOTTLIEB
Assistant Public Defender

ELLIOT H. SCHERKER
Assistant Public Defender

Counsel for Respondent

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BRIEF OF RESPONDENT IN OPPOSITION

The respondent, Ronald Jackson, files this brief in opposition to the petition for writ of certiorari filed by petitioners Richard L. Dugger and Robert A. Butterworth in this cause.

STATEMENT OF THE CASE

Respondent's statement of the case will be limited to a recitation of pertinent factual aspects of the proceedings which are omitted from the statement of the case in the petition.[1]

Prior to the commencement of the jury advisory sentencing proceeding, the prosecutor requested, and the trial court agreed, that the jury be given a special jury instruction not included within the Florida Standard Jury Instructions (RA 4-5). That instruction, which was provided to the jury in writing (RA 13), was as follows:

> When one or more of the aggravating circumstances is found, death is presumed to be the proper sentence unless it or they are overridden by one or more of the mitigating circumstances provided.

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[1] The symbol "PA" will designate petitioners' appendix and the symbol "RA" will designate respondent's appendix.

(RA 1). Defense counsel's objection to the instruction was noted for the record (RA 5).

The defense presented three witnesses in mitigation: two psychologists and one psychiatrist (RA 55-124). According to the doctors, respondent was suffering from severe mental and emotional distress at the time of the offense because his sister had been murdered on the preceding evening (RA 59, 65, 72, 101-02). Additionally, respondent was 18 years of age, was a borderline mental retardate with a mental age between 11 and 16 years, and was functioning at the level of a pre-adolescent (RA 75, 100). Examinations of respondent indicated the presence of brain organicity, with lesions in the left hemisphere of his brain (RA 76-77, 99), probably attributable to narcotics abuse and inhalation of glue and transmission fluid (RA 95-100, 119-20). Respondent was described as an easily-influenced, submissive youth who was the product of a socially and economically deprived environment, and who greatly feared the co-defendant Willie Watts (RA 61, 72, 74, 101). Two doctors testified to respondent's potential for successful psychiatric treatment (RA 82, 105-06).

The doctors concluded that respondent, at the time of the offense, was under the influence of an extreme mental and emotional disturbance (RA 59, 72, 101), and was under the substantial domination of Willie Watts (RA 61, 72, 79, 101-02). The doctors further concluded that respondent's capacity to appreciate the criminality of his conduct, or to conform his conduct to the requirements of the law was substantially impaired (RA 61-62, 77, 103-04).

During closing argument at the sentencing proceeding, the prosecutor argued to the jury as follows:

> Now, let's go to the law. The Court is going to tell you what the law is. The Court is going to tell you that according to the law whether [sic] one or more of the aggravating circumstances is found, death is presumed to be the proper sentence unless it or they are overridden by one or more of the mitigating circumstances.
>
> What aggravating circumstances do we have: Let's go down them one by one and see if any of them exist, and if so, which ones.

(RA 128).

The prosecutor, in urging the jury to find that aggravating circumstances applied, repeated this "death presumption":

> By your verdict of guilty of robbery of Jorge Lamora, you have announced aggravating factors to exist.
> The Court will tell you when one or more of the aggravating circumstances is found, death is presumed to be the proper sentence unless it or they are overridden by one or more of the mitigating circumstances.
> You have found that aggravating factor.

(RA 130).

The prosecutor concluded his closing argument by reiterating that death was presumed the proper sentence upon the finding of one aggravating circumstance (RA 133), rhetorically asking what in mitigation could override the aggravating factors (RA 133-34), and ultimately contending that the legislature had provided the death penalty for cases such as this (RA 134). The trial court, in imposing a death sentence, found two statutory aggravating circumstances, that the offense was committed during a robbery and was especially heinous, atrocious, and cruel, and two statutory mitigating circumstances, petitioner's age of 18 and that this was his first criminal conviction (RA 256-59).

The district court, in denying respondent's petition for writ of habeas corpus, held, as to the presumption jury instruction, that the claim had not been procedurally defaulted in state court (PA 41-42), that the instruction was sanctioned by Barclay v. Florida, 463 U.S. 939, 952-53 (1983) (PA 44-48), and that the defendant was protected from any constitutional infirmity since the jury sentence was advisory and the trial judge was required to make written findings that there were sufficient statutory aggravating circumstances and insufficient mitigating circumstances to outweigh the aggravating circumstances (PA 48). On the question of harmless error, the court found:

> In addition, the Court notes that even if the jury instructions were defective, the Court would find the error to be harmless. Cf. Dobbs v. Kemp, [790 F.2d 1499 (11th Cir. 1986), cert. denied, ___ U.S. ___, 107 S.Ct. 2203 (1987)](impermissible burden-shifting under Sandstrom v. Montana, 442 U.S. 510, 99 S.Ct. 2450 (1979) can be held harmless beyond

a reasonable doubt).

(PA 48-49).

On appeal to the United States Court of Appeals for the Eleventh Circuit, the panel unanimously held that the giving of the presumption jury instruction was constitutional error (PA 16). The court first explained that it had approved this "presumption" when applied by the state supreme court on appeal to affirm a death sentence predicated in part upon improper aggravating circumstances since it operated in that context as a rule of harmless error (PA 16); however, when employed at the level of the sentencer to require a death sentence if one or more aggravating circumstances are not outweighed by the statutory mitigating circumstances, the presumption "vitiates the individualized sentencing determination required by the Eighth Amendment" (PA 18), by restricting consideration of mitigation and creating "the risk that the death penalty w[ould] be imposed in spite of factors which may call for a less severe penalty." (PA 19) (citations omitted). The court concluded that the instruction was at odds with the Florida scheme, as approved by this Court, which was intended to foster an individualized sentence through the balancing of aggravating and mitigating circumstances (PA 20-23), and that "the instruction given is so skewed in favor of death that it fails to channel the jury's sentencing discretion appropriately." (PA 23)(citation omitted).

REASONS FOR NOT GRANTING THE WRIT

THE DECISION OF THE COURT OF APPEALS IS IN COMPLETE HARMONY WITH THIS COURT'S EIGHTH AMENDMENT PRECEDENT REQUIRING INDIVIDUALIZED SENTENCING IN CAPITAL PROCEEDINGS.

Petitioners raise two bases for invocation of this Court's certiorari jurisdiction: first, that the decision below is in direct conflict with the decision of the state supreme court in State v. Dixon, 283 So.2d 1 (Fla. 1973), cert. denied, 416 U.S. 943 (1974), and with the decisions of this Court in Barclay v. Florida, 463 U.S. 939 (1983) and Proffitt v. Florida, 428 U.S. 242 (1976), and second, that the Court of Appeals abdicated its responsibility under Rose v. Clark, 478 U.S. 570, 106 S.Ct. 3101

(1986), to perform a harmless-error inquiry upon finding that the presumption jury instruction was constitutional error. Neither claim has merit.

A. The Decision Does Not Conflict With State v. Dixon, Barclay v. Florida, Or Proffitt v. Florida.

It is true that the instruction with which respondent's jury was charged was taken from language in State v. Dixon. This has never been disputed. But this fact does not render the decision below in conflict with Dixon, as petitioners contend. Petition at 21. For conspicuously absent from the decision in Dixon is the suggestion that the "death presumption" should be given to a sentencing jury as an explanation of its sentencing function.[2] Indeed, as petitioners are forced to concede, Petition at 21, the contested jury instruction has never been incorporated into the Florida Standard Jury Instructions, and for good reason.

The instruction given to respondent's jury explains the sentencing role in a manner which conflicts with the Florida statute, Florida precedent, this Court's interpretation of the Florida capital-punishment structure, and the Eighth Amendment. The first part of the instruction informed the jury that death was presumed the appropriate sentence if one or more aggravating circumstance(s) was found (RA 1). This is not Florida law, and is inconsistent with the assumptions drawn by this Court in upholding the Florida statute under Eighth Amendment scrutiny.

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2 The decision below recognizes that the presumption had been approved by the en banc Eleventh Circuit when employed as a standard of appellate review by the state supreme court. (PA 16)(citing Ford v. Strickland, 696 F.2d 804 (11th Cir.)(en banc), cert. denied, 464 U.S. 865 (1983). When so employed, the presumption "seems very like the application of a harmless error rule." (PA 16)(quoting Ford v. Strickland, 696 F.2d at 815). Indeed, in White v. State, 446 So.2d 1031 (Fla. 1984), the only Florida decision other than Dixon cited by petitioners, Petition at 27, the presumption was used in precisely this fashion. 446 So.2d at 1037 (citing Dixon).

This Court has similarly referred to this presumption as Florida's "harmless-error analysis" for death penalty appeals, Barclay v. Florida, 463 U.S. at 955. Significantly, the Court has noted that even when so employed, the presumption has proven too stringent, as exemplified by cases where there have been no mitigating circumstances and only one of several aggravating circumstances upheld on appeal, and the state supreme court has nonetheless remanded for resentencing. Id. at 955; id. at 964 & n.7 (Stevens, J., concurring).

The second part of the presumption instruction, permitting the override of the presumptively-appropriate death sentence only if overriding statutory mitigating circumstances were established, is also contrary to Florida precedent and the statute as construed by this Court in the very decisions upon which petitioners predicate their conflict argument. Most significantly, the presumption instruction taken as a whole, and considered in light of the totality of the jury instructions in this case, totally vitiates the Eighth Amendment requisite of individualized sentencing, as the court below correctly found. (PA 17-23).[3]

Under the Florida capital-sentencing statute, Section 921.141, Florida Statutes (1973), the sentencing verdict of the jury is based upon three findings:

> (2) ADVISORY SENTENCE BY JURY. -After hearing all the evidence, the jury shall deliberate and return an advisory sentence to the court, based upon the following matters:
> (a) Whether sufficient aggravating circumstances exist as enumerated in subsection [5];
> (b) Whether sufficient mitigating circumstances exist as enumerated in subsection [6], which outweigh the aggravating circumstances found to exist; and
> (c) Based on these considerations, whether the defendant should be sentenced to life [imprisonment] or death.[4]

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[3] Contrary to petitioners' contention, the Eleventh Circuit did not give "disparate treatment to the identical claim", Petition at 22, in Funchess v. Wainwright, 772 F.2d 683 (11th Cir. 1985), cert. denied, 475 U.S. 1031 (1986). The issue which the court addressed in Funchess was that of ineffective assistance of appellate counsel. Id. at 695. The court was not presented with the substantive issue of the constitutional propriety of the presumption instruction and did not reach that issue. Ibid. This issue was first presented and resolved in this case.

[4] Under Section 921.141(3), Florida Statutes (1973), the trial court could only impose a death sentence after making the following predicate findings:

> (a) That sufficient aggravating circumstances exist as enumerated in subsection [5], and
> (b) That there are insufficient mitigating circumstances, as enumerated in subsection [6], to outweigh the aggravating circumstances.

Sections 921.141(2)(b) and (3)(b) were amended after the decision in Lockett v. Ohio, 438 U.S. 586 (1978), to delete the reference to the mitigating circumstances "as enumerated" in the statute. Ch. 79-353, Laws of Fla. (1979). Sections 921.141 (2)(a) and (3)(a) have remained unaltered.

As is readily gleaned, a death sentence is only to be considered upon the finding of an aggravating circumstance and the sentencer is only to proceed to the weighing of the mitigating circumstances upon a finding that the aggravating circumstances are sufficient to justify a death sentence.[5] Death is not the presumed sentence upon the finding of an aggravating circumstance, as respondent's jury was instructed.[6]

The decisions of State v. Dixon, Barclay v. Florida, and Proffitt v. Florida, do not hold to the contrary. In fact, in Dixon, the state supreme court, in discussing the sentencing role of the jury, noted the need to consider "whether the crime was accompanied by aggravating circumstances sufficient to require death, or whether there were mitigating circumstances which require a lesser penalty." 283 So.2d at 8 (emphasis supplied). In Barclay, this Court, after quoting its analysis of the Florida statute in Proffitt, reiterated that the Florida statute "requires the sentencer to find at least one valid statutory aggravating circumstance before the death penalty may even be considered." 463 U.S. at 954 (emphasis supplied). In so concluding, this Court focused on the modifier "sufficient", as used in the statute:

> The language of the statute, which provides that the sentencer must determine whether "sufficient aggravating circumstances exist," § 921.141(3)(a), indicates that any single statutory aggravating circumstance may not be adequate to meet this standard if, in the circumstances of a particular case, it is not sufficiently weighty to justify the death penalty.

Id. at 954 n.12. The mandatory presumption that death was the proper sentence if any aggravating circumstance was found, which

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[5] The court below did not predicate its holding that the instruction in this case was unconstitutional upon a finding that there was -- in either the statute or the instruction itself -- an impermissible allocation of the burden of proof to the capital defendant, and petitioners' attempt to so characterize the decision, Petition at 28-32, is utterly specious.

[6] The sentencing findings of the trial court suggest that the court also adhered to this presumption that death was the proper sentence upon the finding of any statutory aggravating circumstance. (RA 256-57).

the state prosecutor utilized as the theme of his closing argument to the jury (RA 128, 130, 133-34), is not and has never been Florida law.

The second component of the presumption instruction, which permits for a sentence other than death only if the aggravating circumstance(s) are overridden by the statutory mitigating circumstances, also represents a serious departure from Florida law and Eighth Amendment jurisprudence. The use of the modifier "provided" when explaining the mitigating circumstances which could be employed in the weighing process inexorably limited the sentencing consideration of mitigation in an unconstitutional manner.[7]

The state supreme court has made it unquestionably clear that mitigation in Florida is not limited to the statutory factors. E.g., Songer v. State, 365 So.2d 696, 700 (Fla. 1978)(on rehearing), cert. denied, 441 U.S. 956 (1979). This Court, in the cases upon which petitioners base their conflict claim, has specifically so recognized in construing the Florida statute. Barclay v. Florida, 463 U.S. at 953 n.11, 954; id. at 961 & n. 3 (Stevens, J., concurring); Proffitt v. Florida, 428 U.S. at 250 n.8. And there is no question but that the Constitution requires full and unrestricted consideration of mitigation in the determination whether imposition of a death sentence is appropriate. E.g., Hitchcock v. Dugger, ___ U.S. ___, 107 S.Ct. 1821 (1987); Eddings v. Oklahoma, 455 U.S. 104 (1982); Lockett v. Ohio, 438 U.S. 586 (1978).

Petitioner's jury was instructed in a manner which directly conflicts with basic Eighth Amendment precepts articulated in the precedent of this Court. The presumption instruction so limited

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7 This limitation was only exacerbated by the totality of the remaining jury instructions which virtually mirror those condemned in Hitchcock v. Dugger, ___ U.S. ___, 107 S.Ct. 1821 (1987). In fact, prior to the rendition of the Hitchcock decision, petitioners conceded in the court below that the decision in Hitchcock "may be dispositive" of respondent's Lockett claim (RA 188), and that "[o]f course, the United States Supreme Court may unburden this court of the decision in this matter by ruling on the pending petition for certiorari in Hitchcock v. Wainwright, 106 S.Ct. 2888, prior to the resolution of the instant case." (RA 202).

the jury's consideration of mitigation as to "vitiate[] the individualized sentencing determination required by the Eighth Amendment." (PA 18). Accordingly, the court below correctly found constitutional error where respondent's jury was charged with an instruction which "'create[d] the risk that the death penalty w[ould] be imposed in spite of factors which may call for a less severe penalty.'" (PA 19)(citations omitted).

B. The Decision Does Not Conflict With Rose v. Clark.

Petitioners' contention that the decision of the court below threatens the "uniform application of the Rose v. Clark, doctrine throughout the federal system," Petition at 34, is totally frivolous. Petitioners' thesis proceeds from the faulty premise that the absence of a harmless-error discussion on the face of the court's decision means that the court refused to consider the harmless-error question. Petition at 34-35. From this misconception, the argument continues that the court, "by ignoring the clear dictates of Rose v. Clark, has jeopardized the consistent application of the Chapman v. California, [386 U.S. 18 (1967)] harmless error doctrine to capital sentencing proceeding[s]." Petition at 40-41. Petitioners thus urge that certiorari review is necessary to "solidify the applicability of Chapman to penalty phase errors, an opportunity which eluded this Court in Hitchcock." Petition at 41.

Rose v. Clark does not require that a decision which holds jury instructions constitutionally infirm must also manifest an explanation why the constitutional error is not harmless. See Rose v. Clark, 106 S.Ct. at 3103-09. The question presented, and decided, in Rose, was "whether the harmless error standard of Chapman v. California, [citation omitted] applies to jury instructions that violate the principles of Sandstrom v. Montana, [442 U.S. 510 (1979)], and Francis v. Franklin, [471 U.S. 307 (1985)]." Rose v. Clark, 106 S.Ct. at 3101.[8] The Court's

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8 This Court, in holding that it does, resolved the issue on which the Court had been equally divided in Connecticut v. Johnson, 460 U.S. 73 (1983), and on which the state and federal courts had been in conflict. Rose v. Clark, 106 S.Ct. at 3103 (Cont'd)

holding that the harmless-error doctrine does apply to such jury-instruction errors mandates consideration of the doctrine, but does not require that that consideration be reflected through analysis in the decision itself.[9]

This is not a case where the Court of Appeals below stated that it would not apply the harmless-error analysis of Chapman v. California or indicated confusion on whether the harmless-error doctrine applied to the issue presented.[10] Indeed, the court below, subsequent to this Court's opinion in Hitchcock, has applied harmless-error analysis to Hitchcock claims.[11] Clark v. Dugger, 834 F.2d 1561, 1569-70 (11th Cir. 1987)(Hitchcock error held harmless), cert. denied, ___U.S.___, 108 S.Ct. 1282 (1988); Armstrong v. Dugger, 833 F.2d 1430, 1434-36 (11th Cir. 1987)(court indicated that Hitchcock error probably not harmless on the facts, but declined to determine issue due to resolution of another claim); Magill v. Dugger, 824 F.2d 879, 893-95 (11th Cir. 1987)(Hitchcock error not harmless). This is simply a case where the constitutional error could not be harmless: the statutory aggravating and statutory mitigating circumstances were at equipoise (RA 256-58), there was substantial non-statutory

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n.1. Notably, this Court, in Rose, acknowledged that the en banc Eleventh Circuit had been one of the courts which did apply harmless-error analysis to such issues. Ibid. Petitioners likewise acknowledge that "even prior to Rose, the Court of Appeals had consistently applied the harmless error doctrine," but contend that this pattern only renders the court's failure explicitly to address the issue in this case "especially distressing". Petition at 35. As discussed in the text, the failure to perform harmless-error analysis on the face of the decision does not equate with a refusal to find such analysis appropriate.

9 Of course, as previously noted, see pp.5-8 & n.5, supra, the instruction in this case was not held invalid under due process analysis prompted by an impermissible allocation of the burden of proof, as petitioners consistently have contended before this Court. Instead, the court below determined that the instruction violated the defendant's right to an individualized sentencing as guaranteed by the Eighth Amendment.

10 Such had been the case in the lower court in Rose v. Clark, as explained by the Court in noting the grant of certiorari "limited to the question whether the Court of Appeals' harmless-error analysis was correct." 106 S.Ct. at 3105 (footnote omitted).

11 In fact, petitioners so explicitly concede. Petition at 39-40.

mitigation presented and argued (RA 55-124, 134-46),[12] and the trial court's findings, as well as logic, suggest that it too applied the erroneous presumption to the sentencing determination. (RA 256-57).[13] The court thus correctly concluded that the jury instructions "'create[d] the risk that the death penalty w[ould] be imposed in spite of factors which may call for a less severe penalty.'" (PA 19-20)(citations omitted).

CONCLUSION

Based upon the foregoing, respondent requests this Court to deny the petition for writ of certiorari in this cause.

Respectfully submitted,

BENNETT H. BRUMMER
Public Defender
Eleventh Judicial Circuit
of Florida
1351 Northwest 12th Street
Miami, Florida 33125
(305) 545-3005

BY: Karen M. Gottlieb
KAREN M. GOTTLIEB
Assistant Public Defender

Elliot H. Scherker
ELLIOT H. SCHERKER
Assistant Public Defender

Counsel for Respondent

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12 Petitioners expressly conceded this point before the Court of Appeals. (RA 199).

13 It should not go unnoticed that the District Court's harmless-error finding which petitioners acclaim, Petition at 18, 34, consists of a single sentence in which the court "notes that even if the jury instructions were defective, the Court would find the error to be harmless." (PA 48)(citation omitted). Petitioners' meager harmless-error argument presented in the Brief of Respondent/Appellee filed in the court below also should not go unnoticed. (RA 204).

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NOTICE OF APPEARANCE

The undersigned hereby enter their appearance as counsel for the respondent, Ronald Jackson, in the above-styled cause.

BENNETT H. BRUMMER
Public Defender
Eleventh Judicial Circuit
of Florida
1351 Northwest 12th Street
Miami, Florida 33125
(305) 545-3005

BY: Karen M. Gottlieb
KAREN M. GOTTLIEB
Asssistant Public Defender

Elliot H. Scherker
ELLIOT H. SCHERKER
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that true and correct copies of the foregoing Brief In Opposition, Motion for Leave to Proceed *In Forma Pauperis*, and Notice of Appearance have been served upon RALPH BARREIRA Assistant Attorney General, 401 N.W. Second Avenue, Suite N921, Miami, Florida 33128, counsel for petitioners, by depositing same in the United States mail, first class mail, postage prepaid, this 27th day of April, 1988, and that all parties required to be served have been served this date.

BENNETT H. BRUMMER
Public Defender
Eleventh Judicial Circuit
of Florida
1351 Northwest 12th Street
Miami, Florida 33125
(305) 545-3005

BY: Karen M. Gottlieb
KAREN M. GOTTLIEB
Asssistant Public Defender